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No.____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

RCA CORPORATION,

Petitioner

v.

SAM MALIA and INGRID MALIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Should not the Court grant the writ and decide this case in conjunction with *Williams v. Caterpillar Tractor Co.*, 786 F.2d 928 (9th Cir. 1986), *cert. granted*, 55 U.S.L.W. 3357 (U.S. November 17, 1986) (No. 86-526), which raises virtually the same issue of preemption under the Labor Management Relations Act that is presented by this case?

2. When six Courts of Appeals are in conflict over the right of a unionized employee to sue under state law to enforce an alleged private agreement concerning his or her terms and conditions of employment, should not this Court resolve this important issue of national labor policy?

3. Does not the decision of the court below, that a unionized employee may enter into private employment agreements which are enforceable under state law, conflict with federal labor policy, because it would: (a) destroy uniformity in national labor policy, (b) undermine the position of labor unions as exclusive bargaining agents, and (c) replace arbitration with litigation as the primary tool for resolving disputes in the unionized work environment?

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October Term, 1986

RCA CORPORATION,

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v.

SAM MALIA AND INGRID MALIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RCA Corporation petitions for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Third Circuit, entered on July 10, 1986.[1]

OPINIONS BELOW

The Opinion of the United States District Court for the Middle District of Pennsylvania (A15-23)[2] has not

1. RCA Corporation, petitioner herein, is a Delaware corporation which is a wholly-owned subsidiary of General Electric Company, a New York corporation. Excluding wholly-owned subsidiaries and comparable business entities, RCA Corporation's only other reportable business relationship is its share as a partner in a New York partnership, RCA/Ariola International.

2. References herein to "A" pages are to the appendix to this petition.

been reported. The Opinion of the United States Court of Appeals for the Third Circuit, which reversed the ruling of the District Court (A2-14), is officially reported at 794 F.2d 909. The Order of the Court of Appeals denying rehearing and rehearing *in banc* (A1) is unreported.

JURISDICTION

The Judgment of the Court of Appeals was entered on July 10, 1986. The Order denying rehearing and rehearing *in banc* was entered on September 3, 1986. On December 1, 1986, Justice Brennan extended the time for filing a petition for a writ of *certiorari* to December 16, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 2350(a).

STATUTORY PROVISION INVOLVED

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), states:

(a) Venue, amount, and citizenship

> Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

This case raises a frequently litigated issue which has divided six Courts of Appeals. The specific question is whether an employee who is represented by a labor union may negotiate a private agreement concerning his or her working conditions which is enforceable under state law. A divided panel of the Third Circuit answered this question affirmatively. At the present time, the Third

and Eighth Circuits are aligned on this issue in conflict with decisions of the Fifth, Sixth, Ninth, and Eleventh Circuits.

This Court recently has granted review in a case which raises this very issue. *Williams v. Caterpillar Tractor Co.*, 786 F.2d 928 (9th Cir. 1986), *cert. granted*, 55 U.S.L.W. 3357 (U.S. November 17, 1986) (No. 86-526).

The operative facts in the instant case arise from a claim brought by Sam Malia ("Malia"), who has been employed by RCA Corporation ("RCA") at its plant in Dunmore, Pennsylvania, since 1966. During his first eighteen years with RCA, Malia was a member of a bargaining unit represented by Local 178 of the International Union of Electrical, Radio and Machine Workers ("Local 178"). Throughout all times relevant to this case, RCA and Local 178 have been parties to a collective bargaining agreement which provides for resolution of all disputes through arbitration (A4,20).

The complaint in this case alleges that Harlon May ("May"), the manager of RCA's Dunmore plant, offered in April 1984 to promote Malia to inventory coordinator, a managerial position outside the bargaining unit. Malia avers that he accepted the promotion in reliance upon oral representations from May that the new position would involve several advantages, including increased overtime, better pay, opportunities for further promotion, less job-related stress, and an option to return to the bargaining unit if the promotion did not prove satisfactory.

Malia assumed the position of inventory coordinator on April 9, 1984. He soon became dissatisfied with his new job duties, and, on April 27, 1984, requested reinstatement to the bargaining unit. RCA refused, and Malia remains an inventory coordinator at the Dunmore plant to this day.

In March 1985, Malia and his wife brought suit against RCA in the Court of Common Pleas for

Lackawanna County, Pennsylvania. The complaint alleged that RCA's refusal to return Malia to the bargaining unit justified relief under five state law causes of action, *viz.*, breach of contract, fraudulent misrepresentation, tortious interference with contractual relations, intentional infliction of emotional distress, and loss of consortium. RCA removed the case to the United States District Court for the Middle District of Pennsylvania, claiming subject matter jurisdiction under both diversity of citizenship and § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 ("LMRA").

The District Court granted RCA summary judgment on the ground that Malia's state law claims were preempted by the LMRA. The District Court noted that, according to *Allis-Chalmers v. Lueck*, 471 U.S. 202, 208-09 (1985), state law remedies are superseded by § 301 of the LMRA when they are invoked in connection with rights that are governed by a collective bargaining agreement (A18-19). The District Court concluded that any right which Malia could possibly have to return to the bargaining unit had to be rooted in the collective bargaining agreement between RCA and Local 178 (A18-20). Therefore, the validity of Malia's claim to reinstatement turned entirely upon an interpretation of the collective bargaining agreement, and, as a result, his state law remedies were preempted (A20).[3] The District

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3. In finding that the collective bargaining agreement governed whatever right Malia had to reinstatement in the bargaining unit, the District Court held that paragraph 56.04 of the Local 178 contract was designed to govern the reinstatement rights of bargaining unit members who were transferred or promoted out of the unit (A19-20). Paragraph 56.04 states:

> Paragraph 56.04 SENIORITY PRIVILEGES FOR EMPLOYEES WHO ARE TRANSFERRED OUT OF THE BARGAINING UNIT: When an employee has established seniority privileges in an occupational classification within the Bargaining Unit and is or has been thereafter transferred or promoted to another position which is not within the Bargaining Unit, in the event such employee is again

Court also found that Malia's state law claims could not be salvaged by recharacterizing them as federal claims under § 301 of the LMRA because, in that event, they would be barred by the six-month statute of limitations established by *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983) (A20-22).

The majority opinion of the Court of Appeals agreed that Malia's claims were preempted to the extent that they relied upon the collective bargaining agreement (A8). However, after a "careful reading" of the agreement, the majority concluded that nothing in the contractual language specifically stated whether an employee in Malia's position had a right to reinstatement (A7-8). The majority further found that, since the text of the Local 178 agreement left the issue of reinstatement unsettled, Malia was free to negotiate with RCA a private "oral contract" concerning reinstatement which was "completely separate from the collective bargaining agreement" and enforceable under state law (A8). Thus, the crux of the holding below is that a unionized employee may negotiate a private employment agreement with respect to his working conditions which are not covered by the specific language of a collective bargaining

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restored to a position within the Bargaining Unit, such employee shall be deemed to have retained but not accumulated seniority privileges within the Bargaining Unit in accordance with Article 56, provided that the privilege of returning to the Bargaining Unit shall be extended to all employees so affected. All employees who are on layoff from the occupation in which such employee holds seniority at the time of the return of such employee to the Bargaining Unit, shall be offered recall before such employee regardless of seniority. However, the employees to whom this provision shall apply shall not exceed in any year the proportion of one (1) such employee to each fifty (50) employees included in the Bargaining Unit. It is understood that present employees who have transferred out of the Bargaining Unit, prior to November 19, 1973, shall retain all of their accumulated seniority acquired prior to such date.

agreement. Judge Becker dissented from the majority opinion on the ground that, "Mr. Malia cannot enforce an oral contract concerning reinstatement because that area of employment relations has been preempted by the collective bargaining agreement." (A13n.2).

REASONS FOR GRANTING THE WRIT

This Court should grant the writ for three reasons. First, the Court has already decided to review *Williams v. Caterpillar Tractor Co.*, 786 F.2d 928 (9th Cir. 1986), *cert. granted*, 55 U.S.L.W. 3357 (U.S. November 17, 1986) (No. 86-526), which raises the same preemption issue as this case. *Williams*, however, contains a threshold jurisdictional issue concerning removal which could prevent the Court from reaching the preemption issue. To insure resolution of this preemption question, which the Court has already found worthy of a writ of *certiorari*, this case should also be docketed for consideration. At the very least, the Court should withhold a ruling on this petition until *Williams* has clarified the governing law.

Second, the instant case would merit a writ of *certiorari*, even if it were assumed that *Williams* is totally inapposite. The federal preemption issue presented by this petition has caused a serious conflict of authority between the Third and Eighth Circuits on one hand and the Fifth, Sixth, Ninth and Eleventh Circuits on the other. Only an authoritative opinion of this Court can resolve the chaos which has resulted from this division in appellate rulings.

Third, the majority opinion below threatens to undermine the central roles of collective bargaining and arbitration in labor-management relations. This Court has held that a collective bargaining agreement covers *all* terms and conditions of employment in a bargaining unit

and that any matters not delineated by explicit contractual language shall be governed by an industrial common law, known as the "law of the shop," which is developed through arbitration decisions. In contrast, the majority opinion below would permit state tort and contract law to fill in the interstices of collective bargaining agreements.

Acceptance of the Third Circuit position would have three adverse consequences. First, it would substitute state tort and contract law for the law of the shop and, would thereby balkanize labor relations on a state-by-state basis. Second, it would undermine the role of labor unions as exclusive bargaining agents by permitting employees to negotiate private employment agreements with respect to numerous working conditions that affect a bargaining unit as a whole, *e.g.*, the right to reinstatement with seniority. Third, the logic of the Third Circuit position would replace arbitration with litigation as the primary vehicle for resolving labor disputes in a unionized environment. In short, the majority opinion below represents nothing less than a direct assault upon the labor policies which this Court has carefully crafted over the last four decades.

I. THE COURT SHOULD GRANT THE WRIT AND DECIDE THIS CASE IN CONJUNCTION WITH *WILLIAMS v. CATERPILLAR TRACTOR CO.*, 786 F.2d 928 (9th Cir. 1986), *cert. granted*, 55 U.S.L.W. 3357 (U.S. November 17, 1986) (No. 86-526), WHICH RAISES VIRTUALLY THE SAME ISSUE OF PREEMPTION UNDER THE LABOR MANAGEMENT RELATIONS ACT THAT IS PRESENTED BY THIS CASE.

The Court has already granted a writ of *certiorari* in order to decide the issue of federal preemption raised by this case, *i.e.*, whether an employee who is covered by a collective bargaining agreement can enforce under state

law a private employment agreement allegedly negotiated with his or her employer. The plaintiffs in *Williams v. Caterpillar Tractor Co.*, 786 F.2d 928 (9th Cir. 1986), *cert. granted*, 55 U.S.L.W. 3357 (U.S. November 17, 1986) (No. 86-526) alleged that they had been promoted from jobs in the bargaining unit to management positions, and, in the latter capacity, had received oral promises of permanent employment. The plaintiffs further averred that they were subsequently demoted back to the bargaining unit and terminated in violation of these promises. The complaint sought relief under the state law theories of breach of employment contract, breach of the duty of good faith and fair dealing, intentional infliction of emotional distress, and fraudulent misrepresentation. *Id.* at 930.

The *Williams* defendant removed the case to federal court, claiming subject matter jurisdiction under § 301 of the LMRA. According to the defendant, any promises to the plaintiffs concerning their employment "were merged into and superseded by the collective bargaining agreement." The district court accepted this argument and dismissed the complaint as preempted. *Id.*

The United States Court of Appeals for the Ninth Circuit reversed on the ground that the complaint sounded in state law. In rejecting the district court's analysis, the Ninth Circuit held that: (1) the promises allegedly made to the plaintiffs were "entirely separate and independent contracts made outside the collective bargaining process," and (2) "resolution of the employees' state law claims is not focused upon interpretation of the collective bargaining agreement." *Id.* at 935-36. Consequently, the Ninth Circuit held that federal jurisdiction was lacking and ordered that the case be remanded to state court.

This Court has decided to review the *Williams* decision, and, in so doing, will confront the defendant's argument that any employment agreements with the

plaintiffs would be "merged" into the collective bargaining agreement and, thereby, superseded by the LMRA. The instant case also raises this issue, since RCA's preemption argument rests on the premise that any oral agreement between Malia and RCA would be subsumed by the Local 178 labor agreement. Indeed, the reasons supporting preemption are even stronger in this case than in *Williams*, since Malia still belonged to the bargaining unit at the time he supposedly reached his private agreement with supervisor May, and, thus, was still represented by Local 178 in all matters concerning the terms and conditions of his employment.

Consequently, a decision by this Court to reverse the Ninth Circuit in *Williams* would also undermine the Third Circuit's holding that Malia had the power to negotiate a private agreement with RCA enforceable under state law. By contrast, an affirmance in *Williams* would not necessarily dispose of the preemption issue, because such a decision could turn on the specifics of removal jurisdiction or the fact that the employees did not belong to the bargaining unit at the time that the actionable representations were allegedly made.

In this case, Malia belonged to the Local 178 bargaining unit at the time the misrepresentations were allegedly made, and subject matter jurisdiction clearly exists, since RCA has an alternative basis for jurisdiction, *viz.*, diversity of citizenship. Accordingly, a decision to grant a writ will certainly lead to a clear cut resolution of the preemption defense. As shall be demonstrated below, the preemption issue has seriously divided the Courts of Appeals and begs for an authoritative ruling from this Court. To secure such a ruling, the Court should docket the instant case for briefing and argument.

II. AN AUTHORITATIVE RULING BY THIS COURT IS NECESSARY TO RESOLVE A FUNDAMENTAL CONFLICT OF AUTHORITY AMONG SIX COURTS OF APPEALS.

The argument that a unionized employee may negotiate a private agreement concerning his working conditions, which is enforceable under state law, has been litigated on numerous occasions. The resulting appellate decisions are in discord.

A. The Ninth Circuit Position

The recent opinion in *Bale v. General Telephone Co.*, 795 F.2d 775 (9th Cir. 1986) conflicts with the majority position below. In *Bale*, the plaintiffs had been hired to work as probationary employees in a unionized company and were terminated at the end of their probationary periods. The plaintiffs then sued, alleging that the employer had violated an oral promise to make them permanent members of the bargaining unit. Like Malia, the plaintiffs sought relief under state law, and their complaint included common law claims for breach of oral contract, fraud, and negligent misrepresentation. The Court of Appeals for the Ninth Circuit rejected all of these theories as being preempted by the LMRA.

According to *Bale*, the state law contract claim failed as a matter of law, because:

> The individual employment contracts entered into by Bale and Fife could . . . be effective only insofar as they were consistent with the collective bargaining agreement. Any breach of the individual employment agreement would therefore fall within the preemptive scope of section 301.

795 F.2d at 779 (citation omitted). The *Bale* court, moreover, found the plaintiffs' tort claims preempted on the following basis:

> [A]djudication of [plaintiffs'] state tort claims would require reference to, and interpretation of the terms of the collective bargaining agreement. In order to prove their fraud and negligent misrepresentation claims, Bale and Fife would be required to show that the terms of the collective bargaining agreement differed significantly from the individual employment contracts they believed they had made. Resolution of their state law claims is therefore "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract."

795 F.2d at 780.

Stated simply, *Bale* holds that a unionized employee cannot have a private state law contract with his or her employer, because any such contract would be: (1) ineffective to the extent that it is inconsistent with the governing collective bargaining agreement, and (2) controlled by federal law to the extent that it is consistent with the collective bargaining agreement. This conclusion contravenes the Third Circuit's recognition of private state law contracts which are "completely separate from the collective bargaining agreement."

Bale also opposes the majority opinion below on the issue of state tort claims. As quoted above, *Bale* holds that a state tort theory is preempted if a court must interpret a collective bargaining agreement to determine whether the rights which the plaintiff claims in his or her private employment agreement differ from those guaranteed to all members of the bargaining unit. In the instant case, the majority was required to engage in a "careful reading" of the collective bargaining agreement to determine if the alleged "oral contract" between May and Malia created rights different from those enjoyed by the other members of Local 178 (A7-8). Under *Bale*, this need for a "careful reading" of the collective bargaining agreement would have mandated preemption. The Third

Circuit, however, considers such a "careful reading" appropriate to the resolution of state law claims.

Significantly, *Bale* is only one of a series of Ninth Circuit decisions which contravene the majority opinion below. In *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468 (9th Cir. 1984), the plaintiff was a bargaining unit member who alleged that he had been terminated in violation of rights granted to him in an employee handbook, which — like Malia's alleged conversation with May — purportedly constituted an independent employment agreement. The complaint contained two state law theories also invoked by Malia, breach of contract and intentional infliction of emotional distress. The Court of Appeals for the Ninth Circuit held both of these claims preempted.

Olguin rejected the contract theory on the same principle that would later be applied in *Bale*, *i.e.*, a unionized plaintiff may not assert any employment contract other than the collective bargaining agreement. 740 F.2d at 1474. In disposing of the emotional distress claim, the court stated that an employee in a unionized workplace may only attack "employment or working conditions" pursuant to remedies provided by federal law, such as grievance procedures established by the governing collective bargaining agreement. The emotional distress claim in *Olguin* was in reality a challenge to the plaintiff's discharge, which the court considered to be a working condition. Therefore, the plaintiff could not resort to state law to obtain relief. *Id.* at 1476.

Malia's emotional distress claim, like that of the *Olguin* plaintiff, is simply an attack upon RCA's refusal to reinstate him in the bargaining unit. By any definition, this dispute centers on "employment or working conditions." Hence, Malia's emotional distress claim would be preempted under *Olguin*.

Other Ninth Circuit precedents rejecting claims of the nature recognized by the majority opinion below include *Truex v. Garrett Freightlines*, 784 F.2d 1347 (9th

Cir. 1985) (harassment, intentional infliction of emotional distress, negligent employment); *Evangelista v. Inlandboatmen's Union of the Pacific*, 777 F.2d 1390, 1400-01 (9th Cir. 1985) (tortious interference with contractual relations); *Carter v. Smith Food King*, 765 F.2d 916, 921 (9th Cir. 1985) (intentional infliction of emotional distress). Clearly, the summary judgment in favor of RCA would have been affirmed if Malia had brought his action within the jurisdiction of the Ninth Circuit.

B. The Eleventh Circuit Position

In *Mason v. Continental Group*, 763 F.2d 1219 (11th Cir. 1985), *cert. denied*, 106 S.Ct. 863 (1986), thirty-six unionized plaintiffs initiated a state law action against their former employer for "breach of contract, intentional and willful fraud, and breach of state law fiduciary requirements," alleging that they had relied to their detriment upon false representations that their plant would not be closed before they reached retirement age. *Id.* at 1221. The plaintiffs explicitly disclaimed any reliance on the collective bargaining agreement and, like Malia, alleged that the employer had made misrepresentations which were "separate and apart from the collective bargaining agreement." *Id.* at 1222.

The Eleventh Circuit recognized that the plaintiffs' allegations of fraud were "arguably extrinsic" to the collective bargaining agreement. The court, however, also stated that an employee may not be a party to both a collective bargaining agreement and a private employment contract. Therefore, any attempt under state law to enforce rights in addition to those explicitly or implicitly established by the collective bargaining agreement would be preempted. *Id.* at 1223-24.

Significantly, the *Mason* court cited with approval its prior decision in *Redmond v. Dresser Industries*, 734 F.2d 633 (11th Cir. 1984), which involved facts highly

analogous to those at bar. The plaintiff was a former laborer who accepted promotion to a supervisory position and subsequently sought reinstatement in the bargaining unit. Like Malia, the *Redmond* plaintiff alleged that he had received oral assurances from his employer at the time of the promotion that he would have the option to return to the unit. 734 F.2d at 634-35. When his request for reinstatement was denied, the plaintiff brought an action under state law for "breach of contract, fraud, outrage, and bad faith." The Court of Appeals for the Eleventh Circuit held the state law claims preempted, because a unionized employee covered by a collective bargaining agreement, as the plaintiff was at the time of his promotion, cannot receive additional rights through a "separate, individual employment agreement." *Id.* at 635.[4]

Read together, *Mason* and *Redmond* conclusively establish that the Court of Appeals for the Eleventh Circuit will not permit an employee covered by a collective bargaining agreement to use state tort and contract law to enforce a private "oral agreement" extrinsic to the collective bargaining agreement. Therefore, the Eleventh Circuit's position is fundamentally incompatible with that of the Third Circuit.

C. The Fifth Circuit Position

The plaintiff in *Eitmann v. New Orleans Public Service*, 730 F.2d 359 (5th Cir.), *cert. denied*, 469 U.S. 1018

4. The majority opinion below attempted to distinguish *Redmond* as a case "based on a collective bargaining agreement" (A 8n.4). The basis for that contention is unclear, because the majority's discussion of *Redmond* was cryptic. In any event, this attempt to circumvent *Redmond* must fail; since *Redmond*'s holding, and its subsequent amplification in *Mason*, clearly demonstrate that the Eleventh Circuit recognized *Redmond* as an attempt to assert a separate employment agreement based upon oral promises of supervisory personnel.

(1984), was a union member who sued his employer under state law alleging that he had been terminated in violation of an oral contract negotiated with his employer at the time of his hiring. As in this case, the district court awarded the employer summary judgment on the ground that the state law action was barred by § 301 of the LMRA. Anticipating the position which the Third Circuit would adopt in this case, the *Eitmann* plaintiff argued on appeal that preemption was inappropriate, because his oral contract was "independent" of the collective bargaining agreement. The Court of Appeals for the Fifth Circuit recognized that the case involved "a dispute with regard to company practices, policies or actions that *are not explicitly covered by the collective bargaining agreement*" but nonetheless concluded that the dispute was properly "within the scope of the contractual grievance procedure." 730 F.2d at 363 (emphasis added). Therefore, the district court's summary judgment ruling was affirmed.

Eitmann cannot be reconciled with the Third Circuit position. Whereas the majority opinion below would permit unionized employees to negotiate employment contracts with respect to working conditions left open by a "careful reading" of the applicable collective bargaining agreement, the Fifth Circuit explicitly rejects such private employment contracts in that context.

D. The Sixth Circuit Position

Martin v. Associated Truck Lines, 801 F.2d 246 (6th Cir. 1986) illustrates another example in which a Court of Appeals reached an opposite conclusion concerning facts analogous to those at bar. The plaintiffs were a group of union members who relocated from Toledo, Ohio, to other points in the Midwest in reliance upon representations from their employer that they had to do

so in order to preserve their seniority and to avoid termination without unemployment compensation. The relocation involved various financial hardships, including reduced pay and increased commuting expenses. The plaintiffs sued when they allegedly discovered that the representations concerning the need to relocate had been false. The claims for relief included state law theories of intentional and negligent misrepresentations.

The *Martin* court noted that it would be impossible to begin analyzing the state law claims without first examining the collective bargaining agreement to determine if the employer had in fact misrepresented the plaintiffs' rights and duties *vis-a-vis* relocation. For this reason, the Sixth Circuit found that the "merits" of the misrepresentation claims "certainly depend upon an interpretation of the bargaining agreement" and that state law remedies were therefore preempted. *Id.* at 249.

Thus, *Martin* agrees with the Ninth Circuit position, as set forth in *Bale*, that a state law claim is preempted if a court must interpret a collective bargaining agreement in order to resolve the merits of the case. As previously explained, the majority opinion below found to the contrary, and freely engaged in a "careful reading" of the agreement between RCA and Local 178 before determining whether or not Malia had stated a valid claim. Consequently, the Third and Sixth Circuits are also in conflict.

E. The Eighth Circuit Position

One Court of Appeals has accepted the position of the majority opinion below. In *Anderson v. Ford Motor Co.*, 803 F.2d 953 (8th Cir. 1986), a group of unionized employees who had been laid-off sued their employer for violating alleged oral assurances of continued employment made at the time of their hiring. The complaint

sought relief under a variety of state law theories, including "fraud" and "breach of a verbal contract of employment." The Eighth Circuit recognized that the logic of *Bale* would have called for preemption, but nevertheless sustained the plaintiffs' state law claims on the following basis:

> [T]he source of the torts of fraud and negligent misrepresentation satisfies us that these claims arise in state common law and are measured by standards of conduct and responsibility completely separate from and independent of a collective bargaining agreement. Thus we do not agree with the court in *Bale* that adjudication of these state law claims requires any significant reference to the terms of the collective bargaining agreement. Our analysis is supported by *Malia v. RCA Corp.*, 794 F.2d 909 (3rd Cir. 1986), where it was held that an employee's state law tort claims, which arose from alleged representations by his employer that he could elect to return to his former position if he was not satisfied with a promotion, were not dependent on and did not interfere with a collective bargaining agreement. *Id.* at 913. Thus, the claims were held not preempted by §301 under the *Lueck* standard.

Id. at 958-959.

Judge Bright authored a strong dissent in *Anderson*, in which he described the majority's conclusion as "completely out of step with the preemption doctrine central to federal labor law." *Id.* at 959. The dissent found preemption appropriate, because there was "simply no way around the inextricable meshing of the collective bargaining agreement and appellants' claims." *Id.* Furthermore, Judge Bright stated that "the majority, by

dismissing the Ninth Circuit's analysis in *Bale v. General Telephone Co.*, 795 F.2d 775 (9th Cir. 1986), has unnecessarily created a conflict in the circuits." *Id.* at 960.

In sum, *Anderson* sides with the Third Circuit, and against the Fifth, Sixth, Ninth, and Eleventh Circuits, in finding that representations "separate from and independent of a collective bargaining agreement" can give rights to a unionized employee which are enforceable under state law. *Anderson* also indicates that the majority opinion below played a major role in engineering the split of authority, since the Third Circuit was the first court to break with the majority of appellate courts on the preemption issue.[5]

III. THE THIRD CIRCUIT'S RULING CONSTITUTES A DIRECT CHALLENGE TO THIS COURT'S PRECEDENTS CONCERNING THE CENTRAL ROLE OF COLLECTIVE BARGAINING AND ARBITRATION IN INDUSTRIAL SELF-GOVERNMENT.

The majority opinion below rests on three assumptions. The first is that a collective bargaining agreement only governs working conditions covered by "a careful reading" of its explicit language and that state law

5. The Eighth Circuit's recent decision in *Johnson v. Hussman Corp.*, 123 L.R.R.M. (BNA) 3074 (8th Cir. 1986) further illustrates the need for an authoritative decision of this Court. The plaintiff alleged that he had been discharged in retaliation for filing a workers' compensation claim. The district court granted summary judgment, holding that since the plaintiff was covered by a collective bargaining agreement, his state law action was preempted. Despite the fact that the wrongful discharge claim arose from the state workers' compensation statute, which certainly had a "separate and independent" existence apart from the collective bargaining agreement, the Eighth Circuit affirmed the finding of preemption. 123 L.R.R.M. (BNA) at 3076. No attempt was made to reconcile this conclusion with *Anderson*, even though both opinions were authored by the same judge. The paradoxical results reached in *Anderson* and *Johnson* highlight the confusion which exists in the Courts of Appeals on this issue.

should fill in the interstices. The second is that an individual union member is free to make a private contract with his or her employer concerning working conditions which are not delineated by a collective bargaining agreement. The third is that arbitration clauses should be construed narrowly. All three of these premises clash with precedents of this Court and threaten federal labor policy as it now exits.

A. The Majority Opinion Below Would Emasculate the "Law of the Shop" and Balkanize Labor Relations on a State-by-State Basis.

In *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960), this Court recognized that a collective bargaining agreement "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." The Court stated the following with respect to ambiguities and incomplete provisions within the text of such agreements:

> Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. Many of the specific practices which underlie the agreement may be unknown, except in hazy form, even to the negotiators. . . . Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties.

Id. at 580-81. Furthermore:

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the

> industrial common law — the practices of the industry and the shop — *is equally a part of the collective bargaining agreement although not expressed in it.*

Id. at 581-82 (emphasis added).

Warrior & Gulf conclusively demonstrates that Malia's claim to reinstatement must be determined under the collective bargaining agreement. Assuming *arguendo* that the Court of Appeals was correct in finding that a "careful reading" of the collective bargaining agreement failed to set forth Malia's right to reinstatement (or lack thereof), then the "gaps" in the Local 178 contract could only be filled by an arbitrator applying the "industrial common law," otherwise known as the "law of the shop," not by a court applying the common law of Pennsylvania.[6]

The Third Circuit's willingness to substitute state tort and contract law for the law of the shop poses a grave threat to federal labor policy as it now exists. In *Allis-Chalmers v. Lueck*, *supra*, 471 U.S. at 211-213, this Court recognized that a primary purpose of preemption by the LMRA is to promote national uniformity in labor relations by preventing the various state courts from applying their own common law principles in the interpretation of collective bargaining agreements. The majority opinion below would largely undermine *Lueck*. As the *Warrior & Gulf* Court recognized, labor disputes commonly involve "gaps" in contractual language which were not wholly appreciated at the time of drafting. By

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6. As explained above, in *Eitmann v. New Orleans Public Service*, *supra*, 730 F.2d at 359, the Fifth Circuit held that a unionized employee cannot negotiate a private contract, even with respect to matters left open by the language of a collective bargaining agreement. *Eitmann* cited *Warrior & Gulf* as direct authority for this proposition. *Id.* at 363.

relegating controversies arising from such "gaps" in contractual language to state law, the Third Circuit would sanction disparate results throughout the nation, in contravention of the national uniformity espoused by *Lueck*.

B. The Majority Opinion Below Would Undermine the Position of Labor Unions as Exclusive Bargaining Agents.

In *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 180 (1967), this Court stated that:

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. *The policy therefore extinguishes the individual employee's power to order his own relations with his employer* and creates a power vested in the chosen representative to act in the interests of all employees. . . . *Thus only the union may contract the employee's terms and conditions of employment, and provisions for processing his grievances.* . . . The employee may disagree with many of the union decisions but is bound by them.

(Emphasis added, footnote and citation omitted). The foregoing language could not have stated more unequivocally that a member of an organized bargaining unit has no "power" to enter into a private contract concerning terms or conditions of employment. As the majority conceded, "Malia was a member of Local 178 when he negotiated the alleged oral contract . . ." (A8). Consequently, any private contract between Malia and RCA would have been void *ab initio*.

The practical significance of this case to labor unions cannot be minimized. As Judge Becker correctly noted in

his dissent, "the single term that Mr. Malia is seeking to enforce — reinstatement to his former position . . . impinges upon the bargaining unit" (A13). If RCA had returned Malia to the Local 178 bargaining unit with full seniority, then he would have impaired the seniority of every unit member hired after 1966 and possibly triggered the layoff of one or more other employees. Since one reinstatement can affect the entire unit, chaos would result if each employee were free to negotiate a private agreement concerning the ground rules for his leaving and reentering the unit. Clearly, the issue of reinstatement can only be resolved through collective bargaining, with all unit members being bound by the provisions of the agreement negotiated on their behalf by Local 178. *NLRB v. Allis-Chalmers, supra,* 388 U.S. at 180.[7]

Significantly, the extent to which the majority opinion below would undermine the position of unions as exclusive bargaining agents is by no means limited by the facts of this case. As explained above, the majority opinion would permit individual employees to negotiate private contracts with respect to any working condition which is not covered by the express terms of a union contract. Such a result would clearly allow individual

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7. *Anderson v. Ford Motor Co., supra,* 803 F.2d at 955 n.2, clearly illustrates the threat to collective bargaining which is posed by the position of the Third and Eighth Circuits. The plaintiffs in that case never brought any claim against the United Automobile International Workers Union ("UAW"), the union which represented the unit in question. The UAW, however, intervened on the side of the employer in order to protect the negotiated seniority list, which was threatened by the plaintiffs' claim to continued employment based on oral statements of company representatives. By recognizing state law claims of this nature, the Third and Eighth Circuits would impair the ability of labor and management to enter into binding agreements with respect to seniority, reinstatement, and other important working conditions.

union members to supersede the authority of their designated bargaining representatives, and would substantially alter the exclusive bargaining relationship between the union and the employer involved.

C. The Majority Opinion Threatens the Federal Labor Policy Favoring Arbitration of Labor Disputes.

This Court has expressed a strong preference for resolving labor disputes through arbitration. *E.g., Boys Markets v. Retail Clerks Union*, 398 U.S. 235, 252-253 (1970). A corollary to this principle provides that when the parties to a collective bargaining agreement adopt an arbitration clause, all disputes which concern working conditions are presumed to fall within the ambit of that clause. According to *Warrior & Gulf, supra*, 363 U.S. at 581, "Apart from matters that the parties *specifically exclude*, all of the questions on which the parties disagree *must* therefore come within the scope of the grievance and arbitration provisions of the collective bargaining agreement." (Emphasis added.)

Nothing in the collective bargaining agreement between RCA and Local 178 "specifically excludes" disputes concerning reinstatement from the scope of the grievance procedure. The majority opinion below, however, stood the presumption of arbitrability on its head and found the dispute nonarbitrable because a "careful reading" of the collective bargaining agreement did not establish that Malia's claim fell within the literal language of the contract. This conclusion is anathema to *Warrior & Gulf* and, if sustained, would create a flood of lawsuits by individuals, such as Malia, who prefer litigation to arbitration.

Judge Becker's dissent correctly noted the majority's failure to apply the presumption of arbitrability. He explained that "any close question about the scope of the coverage of the collective bargaining agreement should be resolved in favor of a broad reading because strong

federal policy interests support such coverage" (A12). According to Judge Becker, "a conclusion that an issue is governed by the collective bargaining agreement furthers 'interpretive uniformity and predictability,' *Allis-Chalmers [v. Lueck]*, 105 S. Ct. at 1911, and the preservation of the "central role of arbitration in our 'system of industrial self-government.' " *Id.* at 219 (A12). *Accord, Mason v. Continental Group, supra*, 763 F.2d at 1222-24; *Eitmann v. New Orleans Public Service, supra*, 730 F.2d at 363.

Once again, the effects of the Third Circuit's opinion would be to impair federal labor policy severely. This Court has recognized that grievance procedures providing for binding arbitration will be undermined if bargaining unit members have the ability to circumvent them in order to sue directly in court. *Republic Steel v. Maddox*, 379 U.S. 650, 653 (1965). By narrowing the scope of issues covered by arbitration from those disputes not "specifically excluded by the parties" to anything not governed by a "careful reading" of the contractual language, the majority opinion below would substantially increase the ability of plaintiffs, such as Malia, to sidestep contractual remedies and to sue their employers in state court. This result would conflict with this Court's statements of a federal labor policy strongly favoring the resolution of all disputes between employees and their employers through the process of binding arbitration under their collective bargaining agreements.

CONCLUSION

For all of the foregoing reasons, RCA requests the Court to grant a Writ of Certiorari to review the decision and judgment of the Third Circuit in this case.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5767

SAM MALIA, et al.
Appellant

v.

RCA CORPORATION

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, GIBBONS, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON and MANSMANN, *Circuit Judges*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

John J. Gibbons
Judge

Dated: September 3, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5767

SAM MALIA and INGRID MALIA
Appellants

v.

RCA CORPORATION

(D.C. Civil No. 85-0721)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

Argued
June 2, 1986
Before: GIBBONS, BECKER, and STAPLETON,
Circuit Judges

(Opinion Filed: July 10, 1986)

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OPINION OF THE COURT

GIBBONS, *Circuit Judge*:

At issue on this appeal is whether section 301 of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 185(a) (1982), preempts an employer's state-law claims for breach of an oral contract of employment, intentional infliction of emotional distress, fraudulent misrepresentation, and intentional interference with contract and also preempts a derivative action by the employee's wife for loss of consortium. The district court reasoned that the state law claims were dependent upon a collective bargaining agreement and therefore held that the claims were preempted by federal law. Although the court went on to construe the complaint as alleging claims under § 301 of the LMRA, it granted summary judgment in favor of the employer because the complaint was not filed within the applicable six-month statute of limitations. Because we conclude that the district court misconstrued the nature of the employee's state law claims, we reverse.

This appeal arises out of a labor dispute in which the plaintiff, Sam Malia, sought to be reinstated to a job within a collective bargaining unit after Malia had been promoted to a supervisory position.[1] Malia had worked as an hourly employee for the defendant, RCA Corporation, from 1966 until April 9, 1984. In connection with his job as an hourly employee, Malia had been a member of a bargaining unit represented by Local 178 of the International Union of Electrical, Radio and Machine Workers. In early April of 1984 Malia, in his capacity as president of Local 178, attended a dinner at which RCA's plant manager, Harlon May, offered to promote Malia to inventory coordinator, a managerial position outside the Local 178 bargaining unit. As an inducement to accepting the promotion, May promised Malia better pay, increased hours and overtime, advancement within the company, less stressful working conditions, and the option to return to the bargaining unit if Malia was not satisfied with the new position. *See* Malia's Complaint at ¶ 6, *reprinted in* Joint Appendix at 4. Malia accepted RCA's offer and began to perform his job as inventory coordinator on April 9, 1984. In less than three weeks Malia requested that he be returned to his former position as soon as such a position became available. On April 28, 1984, such a position became available, but RCA's management did not accede to Malia's request for reassignment. As a result, he has remained in the position of inventory coordinator.

Whether a state law claim is preempted by federal law is a question of congressional intent. *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). Section

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1. Because this is an appeal from a summary judgment we accept the facts as pleaded in Malia's complaint as true. *See* United States v. Athlone Industries, Inc., 746 F.2d 977, 981 (3d Cir. 1984). Our discussion should not, therefore, be construed as bearing on the question of whether the oral contract alleged by Malia has been established as a factual matter.

301 of the LMRA provides a federal right of action for violations of contracts between an employer and a labor organization representing employees. 29 U.S.C. § 185(a) (1982).[2] This statutory provision reflects a congressional intent to ensure that federal common law is applied to the enforcement of collective bargaining agreements. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957). While Congress did not state to what extent it intended § 301 to preempt state law, *see Allis-Chalmers Corp. v. Lueck*, 105 S. Ct. 1904, 1910 (1985), the Supreme Court has recently explained that

> questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort.

Id. at 1911. Thus, in *Allis-Chalmers* the Court held "that when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim or dismissed as pre-empted by federal labor-contract law." *Id.* at 1916 (citation omitted). The focus of inquiry in

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2. Subsection (a) of § 301 reads,

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (1982).

determining § 301 preemption, therefore, is on the nature of the state-law claims because state-law claims that are independent of collective bargaining agreements are not preempted by § 301 of the LMRA. *Id.* at 1912. A logical corollary to the rule preempting state-law claims that depend on collective bargaining agreements is the rule that employees who are members of a collective bargaining unit cannot negotiate individual contracts that are inconsistent with the collective bargaining agreement. *See J. I. Case Co. v. NLRB*, 321 U.S. 332, 337-39 (1944); *Eitmann v. New Orleans Public Service, Inc.*, 730 F.2d 359, 362 (5th Cir. 1984); *see also NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 180 (1967). ("National labor] policy . . . extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. . . . Thus only the union may contract the employee's terms and conditions of employment.")

In the case now under consideration the district court reasoned that Malia's state-law claims depended upon an interpretation of a provision of the Local 178 collective bargaining agreement which the court believed governed Malia's right to be reinstated to the bargaining unit. *See Malia v. RCA Corp.*, No. 85-0721, slip op. at 6-7 (M.D. Pa. Oct. 17, 1985). The provision of the Local 178 contract that the district court was referring to provides in relevant part,

> When an employee has established seniority privileges in an occupational classification within the Bargaining Unit and is or has been thereafter transferred or promoted to another position which is not within the Bargaining Unit, *in the event such employee is again restored to a position within the Bargaining Unit*, such employee shall be deemed to have

> retained but not accumulated seniority privileges within the Bargaining Unit in accordance with Article 56, provided that the privilege of returning to the Bargaining Unit shall be extended to all employees so affected.

Supplementary Local Agreement between RCA and Local 178 at ¶ 56.04, *reprinted in* Joint Appendix at 58 (emphasis supplied). A careful reading of this paragraph reveals that the district court was mistaken. Paragraph 56.04 of the Local 178 collective bargaining agreement does not govern the right *to be* reinstated. Rather it governs the issue of seniority *if* an employee is reinstated to the bargaining unit.[3] In part the district court's misinterpretation can be explained by Malia's misleading reference to paragraph 56.04 in his Complaint. Malia's breach of contract claim alleges, "The Defendant by not reinstating the Plaintiff back into the Bargaining Unit at the Plaintiff's request when a position was available has breached Paragraph 56.04 of the Supplemental Local Agreement between RCA

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3. Focusing on the clause -- "provided that the privilege of returning to the Bargaining Unit shall be extended to all employees so affected" -- the dissent interprets section 56.04 of the collective bargaining agreement as "establishing a right to reinstatement for all employees who have left the bargaining unit." Typescript at 2-3. The clause that the dissent relies upon, however, is more logically interpreted as a provision dealing with group transfer situations. For example, if RCA transferred a group of employees to another occupational classification outside the bargaining unit, section 56.04 would require that if one former unit member was restored to the unit and given her old seniority, the rest of the group would have the option of also returning to the bargaining unit with their old seniority. Thus the clause upon which the dissent relies does not provide a *per se* right of reinstatement, rather it provides a right for union employees to be treated equally. Equal treatment among union members is often an objective of collective bargaining agreements. Moreover, the dissent's interpretation of section 56.04 would give supervisors -- employees who the LMRA expressly excludes from its statutory protection, *see infra* footnote 4 -- the protection of a collective bargaining agreement.

Corporation and Local No. 178." Malia's Complaint at ¶ 16, *reprinted in* Joint Appendix at 6. To the extent that this claim relies on the Local 178 collective bargaining agreement, the claim is preempted. However, Malia's Complaint also alleges facts that would support a claim for breach of an oral contract. *See* Malia's Complaint at ¶¶ 5, 6, and 7, *reprinted in* Joint Appendix at 4. This oral contract is a completely separate agreement from the collective bargaining agreement. In addition this oral contract is not preempted by the rule prohibiting members of a collective bargaining unit from negotiating inconsistent individual contracts. Although Malia was a member of Local 178 when he negotiated the alleged oral contract, the oral contract relates to the job of inventory supervisor -- a management position outside the Local 178 bargaining unit. Nothing in the LMRA prevents an individual -- whether that individual is to be newly hired or promoted from a bargaining unit -- from negotiating an employment contract for a management position.[4]

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4. The LMRA expressly excludes a "supervisor" from its definition of an "employee." *See* 29 U.S.C. § 152(3) (1982). As § 301 is concerned with a contract between employers and organizations representing "employees." 29 U.S.C. § 185(a) (1982), § 301 is not affected by a contract between an employer and a supervisor.

RCA cites Redmond v. Dresser Industries, Inc., 734 F.2d 633 (11th Cir. 1984) (per curiam) for the proposition that former bargaining unit members cannot bring state-law claims based on an individual employment contract. Brief for RCA at 9. RCA, however, has misinterpreted the *Redmond* decision. *Redmond* involved a suit based on a collective bargaining agreement. *See* 734 F.2d at 635-36; Mason v. Continental Group, Inc., 763 F.2d 1219, 1223-24 (11th Cir. 1985)(discussing the *Redmond* decision), *cert. denied*, 106 S. Ct. 863 (1986). It would be illogical to preempt an employment contract merely because the employee had formerly been a member of a collective bargaining unit. Only where the former unit member relies on the collective bargaining agreement -- the situation in *Redmond* -- would such a rule be consistent with the Supreme Court's reasoning in *Allis-Chalmers*.

Nor does LMRA prevent an individual -- whether an applicant for new employment or a current employee in a supervisory position -- from negotiating for a job in a bargaining unit so long as that employment will be on the terms and conditions set forth in the collective bargaining agreement.

Thus, because we construe Malia's Complaint as alleging a state-law breach of contract claim based on an oral employment contract we conclude that that claim and Malia's state-law tort claims, which derive from the breach of the oral contract, are independent of and do not interfere with the Local 178 collective bargaining agreement. We, therefore, hold that the district court erred in concluding that Malia's state-law claims were preempted by § 301 of the LMRA. Given this conclusion, the district court's decision concerning the statute of limitations is irrelevant. The six-month statute of limitations applicable to claims under § 301 of the LMRA does not govern state-law contract and tort claims. The summary judgment will, therefore, be reversed.

BECKER, *Circuit Judge*, dissenting.

In this case we are called upon to determine whether the Malias' claims, which are framed as state common law issues, in fact arise under a collective bargaining agreement. If the claims depend on the collective bargaining agreement, they must be resolved under federal law, pursuant to § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. *Allis-Chalmers Corp. v. Lueck*, 105 S.Ct. 1904 (1985); *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962), and they are time barred. *See Del Costello v. Teamsters*, 462 U.S. 151, 169-72 (1983).

The majority characterizes the Malias' claims as allegations of breach of an oral contract that is independent of the collective bargaining agreement, and therefore holds that the claims may properly be brought under state law. Because I believe that the right to reinstatement that the Malias seek to enforce is governed by the collective bargaining agreement, and is therefore preempted by federal labor law, I respectfully dissent.

Mr. Malia left his position as a laborer for RCA, in which he was a member of a collective bargaining unit, to accept a position as inventory coordinator. Mr. Malia's new job was a managerial position not within the bargaining unit, and Mr. Malia alleges that he accepted it on the strength of several oral promises made to him by plant manager Harlon May. These promises included increased overtime, better pay, advancement with the company, less job-related stress, and the option to return to his former position if the new situation did not prove satisfactory.

After only a short time at his new position, Mr. Malia found that the job of inventory coordinator was not to his liking and requested reinstatement to the bargaining unit. When this request was denied, Mr. Malia brought suit under several common law theories, seeking to enforce his oral contract with Mr. May.

At issue here is whether a claim for reinstatement to the bargaining unit is covered by the terms of the collective bargaining agreement. Section 56.04 of the collective bargaining agreement sets forth the seniority privileges of persons who return to the bargaining unit after leaving it. According to the majority, this section does not govern the right *to be* reinstated to the bargaining unit, but only the right of seniority *if* an employee is reinstated. Under this interpretation, the right to reinstatement is not covered by the collective bargaining agreement, and hence Mr. Malia was free to enter into an independent contract for reinstatement and to sue for enforcement of that contract at common law.

I do not agree with the majority's reading of § 56.04. The last clause of the portion of § 56.04 that is quoted by the majority indicates that the right to be reinstated is indeed governed by that section of the collective bargaining agreement. Section 56.04 provides that an employee who returns to the bargaining unit:

> shall be deemed to have retained but not accumulated seniority privileges within the Bargaining Unit in accordance with Article 56, *provided that the privilege of returning to the Bargaining Unit shall be extended to all employees so affected.*

Supplementary Local Agreement between RCA and Local 1[illegible] at p. 56.04, *reprinted in* Joint Appendix at 58 (emphasis added). I read the emphasized clause as establishing a right to reinstatement for all employees who have left the bargaining unit. I recognize that the purport of the clause upon which I rely is not immediately clear. However, I believe that my interpretation is the most reasonable reading; indeed,

it appears to be the only way to make sense of the clause.[1]

Moreover, any close question about the scope of the coverage of the collective bargaining agreement should be resolved in favor of a broad reading because strong federal policy interests support such coverage. If an issue is covered by a collective bargaining agreement, it not only falls within federal jurisdiction, but, assuming the agreement contains an arbitrary provision, it is resolved in the first instance by an arbitrator. Thus, a conclusion that an issue is governed by the collective bargaining agreement furthers "interpretive uniformity and predictability," *Allis-Chalmers*, 105 S.Ct. at 1911, and the preservation of the central role of arbitration in our system of industrial self-government. *Id.* at 1915.

The majority characterizes the oral contract between Mr. Malia and Mr. May as one that related solely to the terms and conditions of the managerial position of inventory supervisor. It points out that the

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1. The district court apparently assumed that by merely addressing the issue of seniority upon reinstatement, the collective bargaining agreement preempted the entire area of reinstatement. The district court did not determine whether § 56.04 provided for a right to reinstatement, but found that the Malias' claims were preempted by federal law because they were "dependent upon an interpretation of whether paragraph 56.04 of said local agreement confers an unabridged right to reinstatement in the collective bargaining unit upon any union employee who takes a managerial position and then wishes to resume his former status." Joint Appendix at 81-82. Under this approach, it appears that even if the federal court found that § 56.04 conferred no such right, it would not then decide the issue under state common law. I need not go so far as this approach because I find that § 56.04 *does* confer a right to reinstatement in the bargaining unit upon any employee who wishes to return.

oral contract is therefore not "preempted by the rule prohibiting members of a collective bargaining unit from negotiating inconsistent individual contracts," for "[n]othing in the LMRA prevents an individual . . . from negotiating an employment contract for a management position." Majority Opinion, typescript at 8. However, although the oral contract did, for the most part, pertain to the position of inventory supervisor, the single term that Mr. Malia is seeking to enforce -- reinstatement to his former position -- is one that not only impinges upon the bargaining unit, but is provided for in the collective bargaining agreement. Were Mr. Malia attempting to enforce the other terms of the oral contract, such as the promise of more overtime as an inventory coordinator, this would be a different case.[2]

I would affirm the judgment of the district court.

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2. The majority states that "[i]t would be illogical to preempt an employment contract merely because the employee had formerly been a member of a collective bargaining unit." Majority opinion, typescript at 9, n.3. This is certainly true. However, it does not follow that "[o]nly where the former unit member *relies on* the collective bargaining . . . would such a rule be consistent with the Supreme Court's reasoning in *Allis-Chalmers*." *Id.* (emphasis added). The rule is that no employee may contract independently for a condition of employment that is covered by the collective bargaining agreement. Reinstatement to the bargaining unit is such a condition. Mr. Malia cannot enforce an oral contract concerning reinstatement because that area of employment relations has been preempted by the collective bargaining agreement. Therefore, it does not matter that he is not *relying on* the collective bargaining agreement, but rather on an oral contract.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SAM MALIA and INGRID MALIA	:	
Plaintiffs	:	
vs.	:	CIVIL NO. 85-0721
RCA CORPORATION	:	
Defendant	:	

MEMORANDUM AND ORDER

We consider here Defendant's motion to dismiss this complaint for failure to state a claim upon which relief can be granted or, in the alternative, for summary judgment. Defendant has fulfilled its responsibility to provide a timely brief in support of this motion and the Plaintiff has filed a brief in opposition thereto. Defendant has furnished this Court with a reply brief as well. Thus, this matter is now ripe for disposition.[1]

Factual Background:

This case derives from a labor dispute between these parties. Plaintiff Sam Malia began working for Defendant RCA in 1966 and worked at RCA's Dunmore, Pennsylvania installation as a member of the collective bargaining unit until April 9, 1984. On that date Plaintiff, who the record reveals to have been an officer of his union, decided to accept RCA's offer to assume the position of Inventory Coordinator—a managerial position. Thus, Plaintiff ceased to be a member of the collective bargaining unit on the date he assumed his new duties.

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1. In the face of Defendant's case dispositive motion we shall accept the facts as presented by the non-moving party. See *McKnight v. SEPTA*, 583 F. 2d 1229 (3d Cir. 1978).

Plaintiff alleges (allegations we must credit in the context of this motion) that various upper echelon management personnel of RCA induced him to leave his former position by making false assertions as to the benefits of being the Inventory Coordinator and by giving him assurances that if he did not like his new position he would be returned to his former occupation.

Plaintiff's complaint further alleges that the representations made by RCA which induced him to leave his former job were fraudulent and his new work environment did not correspond to what he had been led to expect. Once he determined that this new work environment was not to his liking, Plaintiff took steps to return to the collective bargaining unit. More specifically, he asked the Plant Manager, Harlan May, that he be returned to his former job as soon as such a position became available pursuant to Paragraph 56.04 of the collective bargaining agreement between RCA and Local 178, Plaintiff's former union. On April 28, 1984 such a position became available and RCA's management did not accede to his request for reassignment. Plaintiff alleges that he then went to his former union's Chief Negotiator, Don Arnold, as well as other union officials, and asked for help in expediting his reassignment. He claims that they took no action to assist him and, thus, he continues to work unhappily as a managerial employee.

Legal Theory:

Plaintiff brings this claim as a combined contract and tort action under Pennsylvania law. In his five count complaint Plaintiff alleges breach of contract, fraudulent misrepresentation, intentional interference with contractual relations, intentional infliction of emotional distress, and a derivative claim by Mrs. Ingrid Malia for loss of consortium.

This case was removed from the Lackawanna County Court of Common Pleas on petition of defense counsel. The petition for removal asserts that this Court

has original jurisdiction over these claims pursuant to §301 of the Labor Management Relations Act, 29 U.S.C. §185 and pursuant to the diversity provisions of 28 U.S.C. §1332.

Argument:

Defendant contends that the breach of contract claim is preempted due to the fact that the LMRA provides a specific remedy for any alleged breach of a collective bargaining agreement and, thus, must supersede any authority of a state to interpret a labor contract. More specifically, Defendant's position is that since the dispute over whether Plaintiff has a "right" to reassignment revolves around how the aforementioned Paragraph 56.04 is to be construed, only a claim pursuant to the LMRA can be a proper vehicle therefor.

As to the various tort claims, Defendant's position is that they are similarly preempted due to the rationale expressed in *Allis-Chalmers Corp. v. Lueck*, 105 S. Ct. 1904 (1985). The Supreme Court stated in that case that:

> . . . questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. Any other result would elevate form over substance and allow parties to evade the requirements of §301 by re-labeling their contract claims as claims for tortious breach of contract. *Allis-Chalmers*, supra at 1911.

Thus, it is clear that Defendant asserts that each of Plaintiff's claims is preempted by federal law in deference to national labor policy.

Plaintiff argues that:

> Pre-emption of a state law contract claim by federal labor law is not an issue here. The Defendant made an oral employment contract with the Plaintiff which included the promise that the Plaintiff would be reinstated to his position in the bargaining unit if he so desired. That a provision of the collective bargaining agreement "echoes" or reflects that this promise by Defendant is its routine procedure does not require interpretation of the collective bargaining agreement. See Docket Item 7 at pages 3-4.

Thus, Plaintiff's position is that this Court should not be interpreting a provision of the collective bargaining agreement at all but, rather, should be interpreting whether the oral representations of Defendant's upper echelon employees to the Plaintiff were fraudulent and/or did include a promise of unconditional reassignment should he desire it.

This Court cannot accept the validity of Plaintiff's argument that the terms and conditions of employment with Defendant was controlled — or even affected — by any oral agreements between the parties. It is axiomatic that, where a collective bargaining agreement is in force, it extinguishes an individual employee's power to alter the terms thereof by a separate contract between himself and the employer. Such a separate agreement would be preempted by the collective bargaining agreement. See *Olquin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468, 1474 (1984). The Plaintiff in the instant case makes the allegation that his private negotiations with certain of the Defendant's agents while he was a member of the collective bargaining unit changed the nature of their relationship. Any such attempt on his part would be futile under the doctrine expressed in *Olquin*, supra. Similarly, the Supreme Court held in *Allis-Chalmers*, supra at 1916:

> We. . . hold that when the resolution of a state law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, the claim must be either treated as a §301 claim or dismissed as preempted by federal labor-contract law.

Moreover, it is obvious that paragraph 56.04 of the collective bargaining agreement between Plaintiff's union and RCA was incorporated in anticipation of just such situations as the instant one — situations in which a union employee elects to take a managerial position. That paragraph states:

> Paragraph 56.04 Seniority Privileges for Employees Who are Transferred Out of the Bargaining Unit: *When an employee has established seniority privileges in an occupations classification within the Bargaining Unit and is or has been thereafter transferred or promoted to another position which is not within the Bargaining Unit, in the event such employee is again restored to a position within the Bargaining Unit, such employee shall be deemed to have retained but not accumulated seniority privileges within the Bargaining Unit in accordance with Article 56, provided that the privilege of returning to the Bargaining Unit shall be extended to all employees so affected.* All employees who are on layoff from the occupation in which such employee holds seniority at the time of the return of such employee to the Bargaining Unit, shall be offered recall before such employee regardless of seniority. However, the employees to whom this provision shall apply shall not exceed in any year the proportion of one (1) such employees to each fifty (50) employees included in the Bargaining

> Unit. It is understood that present employees who have transferred out of the Bargaining Unit, prior to November 19, 1973, shall retain all of their accumulated seniority prior to such date. (emphasis ours).

Thus, rather than negotiate a new contract with the employer, the Plaintiff simply exercised his right of "transfer or promotion" under the existing contract. To return to his former position it was incumbent upon him to utilize the mechanism provided by the contract — the grievance procedure. This he did not do.

We now hold that the state law claims confronting us in the case *sub judice* are "substantially dependent upon analysis of the terms of an agreement" — the agreement between Local 178 and RCA. More specifically, they are dependent upon an interpretation of whether paragraph 56.04 of said local agreement confers an unabridged right to reinstatement in the collective bargaining unit upon any union employee who takes a managerial position and then wishes to resume his former status. Thus, since the applicable precedents do not allow us to consider state claims in this situation, we shall give Plaintiff the dual benefit of considering his claims as though they had been brought pursuant to §301 of the LMRA and of assuming that his resort to the grievance procedure, required by §301, would have been futile.

This, however, is of dubious benefit to Plaintiff since it is clear to this Court that this claim was not filed in time to defeat the Defendant's statute of limitations defense. As Defendant points out in its reply memorandum (see Docket Item 8 at page 7), there is a six month limitation period for §301 cases in which, as in the instant

case, the Plaintiff makes allegations that his employer has violated the terms of a collective bargaining agreement and that his union has refused to provide him with adequate representation in framing a grievance.[2] See *Del Costello v. Teamsters*, 462 U.S. 151, 169-72 (1983); also *Faust v. RCA Corp.*, Civil No. 84-1403 (M.D.Pa. April 16, 1985) per Chief Judge Nealon. Even if we assume that there was a breach of contract by RCA in this case and that the union colluded with the employer and refused to process the grievance, we are without authority to provide him the relief he seeks since under the terms of the agreement (See Article 8, §8.03) he had only thirty days to frame his grievance from the time it arose. It arose on the date when his initial request for reinstatement was refused — on or about April 27, 1984 according to Mr. Malia's affidavit. (See Docket Item 7 at paragraph 3 of Exhibit "A"). This, in turn, means that his cause of action under §301 accrued 30 days from April 27, 1985. Therefore, his cause of action pursuant to §301 having accrued on May 27, 1984, it expired six months later, November 27, 1984. Because this complaint was not filed until May 28, 1985, it is clearly time barred.

In summation, we find that any oral agreements Plaintiff may have made with RCA were superseded by the collective bargaining agreement in force between his local and the Defendant. We find, too, that federal labor law preempts state claims in situations which, like the instant one, are substantially dependent upon analysis of a collective bargaining agreement. Finally, we find that even reconstruing this claim as though brought pursuant to §301 of the LMRA does not save Plaintiff's cause of action since it was not filed within the controlling lim-

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2. We do note that the record indicates that Plaintiff never filed a grievance but merely spoke to several union officials in an effort to have them, as Mr. Malia's affidavit puts it, "intercede on my behalf".

itations period for such actions — six months from the time of accrual. An appropriate *Order* follows.

Richard P. Conaboy

Richard P. Conaboy
United States District Judge

DATE: October 17th, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SAM MALIA and INGRID MALIA Plaintiffs	:	
vs.	:	CIVIL NO. 85-0721
RCA CORPORATION Defendant	:	

ORDER

AND NOW, this 17th day of October, 1985, IT IS ORDERED as follows:

1. Defendant's motion for summary judgment is granted.

2. Judgment is hereby entered in Defendant's favor and the Clerk of Courts is directed to close this case.

Richard P. Conaboy

Richard P. Conaboy
United States District Judge

FILED
FEB 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-990

IN THE
Supreme Court of the United States
October Term, 1986

RCA CORPORATION,
Petitioner,

v.

SAM MALIA and INGRID MALIA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Are an employee's claims, asserted under state law for breach of an oral employment contract for a managerial position and for related tort claims, all of which arose after the employee had left the bargaining unit and none of which were predicated on a collective bargaining agreement, preempted by the Labor Management Relations Act?

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IN THE

Supreme Court of the United States

October Term, 1986

No. 86-990

RCA CORPORATION,
Petitioner,

v.

SAM MALIA and INGRID MALIA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Sam Malia and Ingrid Malia, respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision of the Court of Appeals for the Third Circuit in this case. The Court of Appeals' opinion is reported at 794 F.2d 909.[1]

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[1]All citations to the decision below will be made both to the Federal Reporter (Second) and to the Appendix to RCA's Petition for a Writ of Certiorari. The citation format will be as follows: "*Malia v. RCA Corp.*, 794 F.2d 909, ____ (A__)".

STATEMENT OF THE CASE

This Court anticipated the instant case when it observed in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985) that: "The full scope of the pre-emptive effect of federal labor-contract law remains to be fleshed out on a case-by-case basis."

From 1966 until April 9, 1984, Sam Malia ("Malia") was an hourly wage employee of RCA Corporation ("RCA"). As such, he was a member of the collective bargaining unit represented by Local 178 of the International Union of Electrical, Radio and Machine Workers. In early April, 1984, while Malia was President of Local 178, the RCA plant manager offered to promote him to inventory coordinator, a managerial position outside the bargaining unit. To induce Malia to accept this promotion, the Plant Manager promised him better pay, increased work hours and overtime, the opportunity for advancement, less stressful working conditions and the option to return to his bargaining unit position if he was not satisfied with his new position.

Malia accepted this proposal and on April 9, 1984, left the bargaining unit to assume his new management position as inventory coordinator. Three weeks later, he requested reinstatement to his former position within the bargaining unit as soon as such a position became available. A position did become available several weeks later but RCA refused to reassign Malia to that position.

In April, 1985, Malia and his wife filed suit in a Pennsylvania state court. The complaint alleged that RCA's refusal to reinstate Malia to his former position in the bargaining unit constituted a breach of an oral contract for employment, fraudulent misrepresentation, tortious interference with a contract, intentional infliction of emotional distress and loss of consortium. RCA removed the case to the United States District Court for the Middle

District of Pennsylvania on the separate grounds of diversity of citizenship and subject matter jurisdiction under § 301 of the Labor Management Relations (Taft-Hartley) Act. 29 U.S.C. § 185 (1947) ("LMRA").

Malia adopts the description of the holdings of the District Court and the Court of Appeals in RCA's Statement of the case, with two exceptions. First, RCA states that the majority of the Court of Appeals "concluded that nothing in the contractual language *specifically* stated whether an employee in Malia's position had a right to reinstatement." (Pet. at 5; emphasis added).[2] This statement suggests, erroneously, that the collective bargaining agreement contained *some* language which, at least generally, provided a right of reinstatement to employees who had left the bargaining unit. In fact, the Court of Appeals found *no* language whatever in the collective bargaining agreement which in any way alluded to circumstances in which a former hourly employee could be reinstated in the bargaining unit. *See* discussion, *infra* at 6.

Secondly, RCA states that "the crux of the holding below is that a unionized employee may negotiate a private employment agreement with respect to his *working conditions* which are not covered by the specific language of a collective-bargaining agreement." (Pet. at 5-6; emphasis added). This characterization of the holding of the Court of Appeals is likewise inaccurate, in that it implies that the "working conditions" applicable to Malia when he was a member of the bargaining unit are somehow involved in this case. The critical term of Malia's oral contract for a managerial position with RCA – the right to reinstatement – is not, by definition, a "working condition" under the collective bargaining agreement. The right to reinstatement plainly was a condition of Malia's managerial posi-

[2]The citations "Pet. at ____" refer to RCA's Petition for a Writ of Certiorari.

tion, not of his former position within the bargaining unit. Accordingly, the crux of the Court of Appeals decision, as stated by the Court itself, was:

> [B]ecause we construe Malia's Complaint as alleging a state-law breach of contract claim *based on an oral employment contract* we conclude that that claim and Malia's state-law tort claims, which derive from the breach of the oral contract, are independent of and do not interfere with the Local 178 collective-bargaining agreement.

Malia v. RCA Corp., 794 F.2d 909, 913 (A9) (emphasis added).

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Court of Appeals Fully Considered and Correctly Decided the Preemption Issue

In deciding this case, the Court of Appeals expressly applied the standard enunciated by this Court in *Lueck*. The Court of Appeals quoted this Court's ruling that "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim or dismissed as pre-empted by federal labor-contract law." *Malia*, 794 F.2d at 911 (A5) (*quoting from Lueck*, 471 U.S. at 220). Although it found the state-law claim asserted in *Lueck* to be pre-empted,[3]

[3]In *Lueck*, an employee brought a tort action in state court alleging bad faith in the handling of his claim under a disability plan provided by a collective bargaining agreement. The court ruled that a claim arising from the *handling* of a disability claim was "tightly bound" with the *right* to receive disability payments provided in the collective

this Court emphasized the "narrow focus" of its conclusion, stating that "we [do not] hold that every state-law suit asserting a right that relates in some way to a provision in a collective-bargaining agreement, or more generally to the parties to such an agreement, necessarily is pre-empted by § 301." *Lueck*, 471 U.S. at 220.

RCA ignores this admonition by arguing that merely because (a) the collective bargaining agreement mentioned reinstatement (although only in the context of seniority rights); and (b) the claim for reinstatement stemmed from an agreement between an employer and an employee (although a private agreement for a managerial position), Malia's claims, without more, necessarily are pre-empted. Specifically, RCA contends that the following provision in the collective bargaining agreement provides a right of reinstatement and that Malia should have pursued that right under the grievance procedure provided in the agreement:

> Paragraph 56.04 SENIORITY PRIVILEGES FOR EMPLOYEES WHO ARE TRANSFERRED OUT OF THE BARGAINING UNIT: When an employee has established seniority privileges in an occupational classification within the Bargaining Unit and is or has been thereafter transferred or promoted to another position which is not within the Bargaining Unit, *in the event such employee is again restored to a position within the Bargaining Unit,* such employee shall be deemed to have retained but not accumulated seniority privileges within the Bargaining Unit in accordance with Article 56,

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bargaining agreement and therefore was pre-empted. *Lueck*, 471 U.S. at 216. In the instant case, as discussed *infra* at 6, the collective bargaining agreement provided no right to reinstatement.

> provided that the privilege of returning to the Bargaining Unit shall be extended to all employees so affected. All employees who are on layoff from the occupation in which such employee holds seniority at the time of the return of such employee to the Bargaining Unit, shall be offered recall before such employee regardless of seniority. However, the employees to whom this provision shall apply shall not exceed in any year the proportion of one (1) such employee to each fifty (50) employees included in the Bargaining Unit. It is understood that present employees who have transferred out of the Bargaining Unit prior to November 19, 1973, shall retain all of their accumulated seniority acquired prior to such date (emphasis added).

The Court of Appeals rejected RCA's argument, finding that, upon "a careful reading" of this provision, it did not create any *right* to be reinstated but instead specified seniority rights "in the event such employee [one with seniority privileges] is again restored to a position within the Bargaining Unit." *Malia,* 794 F.2d at 912 (A6-7). This finding by the Court of Appeals was correct and, indeed, was compelled by the plain language of the collective bargaining agreement.

RCA, in its Petition, repeatedly notes that the Court of Appeals relied upon a "careful reading" of the collective bargaining agreement to find that Malia's claims were not preempted. RCA thereby attempts to create the impression with this Court that the Court of Appeals impermissibly interpreted the collective bargaining agreement in order to resolve Malia's claim to reinstatement. RCA confuses the appellate court's examination of the collective bargaining agreement for the purpose of determining

whether the agreement embraces a particular claim with an examination of the collective bargaining agreement for the purpose of determining the merits of the claim under the agreement. In every case in which preemption is asserted, a review of the collective bargaining agreement necessarily must be made to determine whether the sweep of the agreement extends to the asserted state-laws claims so as to pre-empt them. This preliminary exercise, however, is entirely distinct from *resolving* a claim which is "inextricably intertwined with consideration of the terms of the labor contract." *Lueck,* 471 U.S. at 213. In sum, the Court of Appeals did scrutinize the collective bargaining agreement, but only – and quite appropriately – to determine whether Malia's claim to reinstatement was within the scope of the agreement.

Moreover, to adopt RCA's interpretation would have left an arbitrator under the grievance procedure with no standards whatsoever by which to assess Malia's claim of entitlement to reinstatement. In effect, RCA would place Malia in a "no-man's land" under the collective bargaining agreement and, at the same time, would deny him the right to assert in state court a claim outside the collective bargaining agreement. In *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), this Court rejected such a tactic. In that case, a group of replacement employees brought suit in a Kentucky state court alleging misrepresentation and breach of contract. The replacement employees had been promised permanent jobs and had been expressly assured that they would not be fired to accommodate returning strikers. The employer and the union settled the unfair labor practice case before the NLRB and the employer laid off the replacements to make room for the returning strikers. The Kentucky Court of Appeals held that the replacement employees' claims were not pre-empted by the National

Labor Relations Act. This Court agreed, finding that the replacement employees' claims were of only peripheral concern to the Act and were deeply rooted in local law. The Court said:

> We find unacceptable the notion that the federal law on the one hand insists on promises of permanent employment if the employer anticipates keeping the replacements in preference to returning strikers, but on the other hand forecloses damages suits for the employer's breach of these very promises.

Belknap, 463 U.S. at 500.

In the instant case, it is likewise unacceptable for RCA, on one hand, to enter into an employment contract with an employee to induce him to leave a collective bargaining unit and to abandon the benefits of a collective bargaining agreement and then, on other hand, to invoke preemption to deny him a major benefit of his employment contract. In this connection, this Court in *Belknap*, in affirming the Kentucky Court of Appeals' finding of no preemption, observed:

> [The Kentucky Court of Appeals] also noted that the misrepresentation and breach of contract involved nonunion individuals who were not parties to the collective-bargaining agreement between the Union and Belknap.

Id. at 497 n.4.

Similarly, Malia's claims arose at a time when he was a nonunion employee not covered by a collective bargaining agreement; indeed, his claims arose from an agreement which was intended expressly to convert him to a nonunion employee.

Malia's state court claims are even more compelling than the damage claims of the replacement employees in *Belknap*. Here, unlike in *Belknap*, no strike, no alleged unfair labor practice, and no NLRB proceeding is involved. In that case, keeping the replacement employees on the job could have interfered with the return of the striking employees. In fact, the Court limited the replacement employees' remedy to damages, noting that:

> Kentucky may not mandate specific performance of the contract between Belknap and respondents nor may it enter an injunction requiring the reinstatement of respondents as a remedy for fraud if either action necessitates the firing of a striker entitled to reinstatement. To do so would be to deprive returning strikers of jobs committed to them by the national labor laws.

Id. at 511 n.13.

In short, if Malia were to prevail on his state claims, his return to the bargaining unit would have no effect on any interest embraced by the federal labor laws; nor would it be inconsistent with the collective bargaining agreement or discourage settlement of a labor dispute. It would do no more than validate Malia's right to assert claims deeply rooted in local law, for Pennsylvania has no less of a "substantial interest in protecting its citizens from misrepresentations that have caused them grievous harm" than did Kentucky in *Belknap*. *Id.* at 511.[4]

[4] *Belknap* was only one in a line of cases in which vital local interests were recognized as paramount. In *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 503 (1984), the Court stated:

> [A]ppropriate consideration for the vitality of our federal system and for a rational allocation of functions belies any easy inference that Congress intended to deprive the States of their ability to retain jurisdiction over such matters. We

In the final analysis, this case is simply one of many which have emerged from the myriad of employment relationships to which the lower courts have applied, and will continue to apply, the legal standards enunciated in *Lueck* and predecessor decisions. The Court of Appeals correctly applied those standards here and, accordingly, this case presents no important question for review.

II. No Conflict of Authority Exists Among the Circuit Courts of Appeals

Granting review in this case would not resolve a conflict among the Circuit Courts of Appeals, for no conflict exists. RCA argues that the appellate decisions are in discord on the issue of whether "a *unionized* employee may negotiate a private agreement concerning his *working conditions*, which is enforceable under state law" (Pet. at 10; emphasis added). Before turning to the appellate decisions which RCA argues are in conflict, it should be reiterated that the above-quoted statement of the issue is *not* the issue in this case since: (1) Malia is not a unionized employee but rather is a managerial employee; and (2) Malia did not negotiate a private agreement concerning his working conditions for a job subject to a collective bargaining agreement but rather for a managerial job. In short, RCA has not articulated an issue presented by the facts of this case as to which any Court of Appeals has rul-

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have, therefore, refrained from finding that the NLRA pre-empts state court jurisdiction over state breach of contract actions by state replacements, Belknap, Inc. v. Hale, 463 U.S. 491 (1983), state trespass actions, Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180 (1978), or state tort remedies for intentional infliction of emotional distress, Farmer v. Carpenters, 430 U.S. 290 (1977) (parallel citations omitted).

ed in contradiction of the Court of Appeals for the Third Circuit in the instant case.

In the cases decided by the Courts of Appeals for the Ninth, Eleventh, Fifth and Sixth Circuits which RCA states reflect a "position" different from the Courts of Appeals for the Third and Eighth Circuits, the plaintiffs were members of a union and held (or had been discharged from) jobs subject to a collective bargaining agreement at the time their respective claims arose.[5] None of the plain-

[5] *Bale v. General Telephone Co.*, 795 F.2d 775, 777 (9th Cir. 1986); *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468, 1470 (9th Cir. 1984); *Truex v. Garrett Freightlines*, 784 F.2d 1347, 1349 (9th Cir. 1985); *Evangelista v. Inlandboatmen's Union of the Pac.*, 777 F.2d 1390, 1393 (9th Cir. 1985); *Carter v. Smith Food King*, 765 F.2d 916, 918 (9th Cir. 1985); *Mason v. Continental Group, Inc.*, 763 F.2d 1219, 1221 (11th Cir. 1985), *cert. denied*, 106 S.Ct. 863 (1986); *Eitmann v. New Orleans Public Serv. Inc.*, 730 F.2d 359, 360 (5th Cir. 1984), *cert. denied*, 469 U.S. 1018 (1984); *Martin v. Associated Trucklines, Inc.*, 801 F.2d 246, 247 (6th Cir. 1986). Only the plaintiff in *Redmond v. Dresser Industries, Inc.*, 734 F.2d 633, 634 (11th Cir. 1984) does not fit this pattern. In *Redmond*, the plaintiff was promoted from a bargaining unit job to a supervisory job at a time when the collective bargaining agreement negotiated by the UMW provided for the return of such an employee to his former bargaining unit job. A subsequent collective bargaining agreement between the employer and a different union limited this right of reinstatement to employees who had occupied supervisory positions for less than six months. After twelve years in the supervisory position, Redmond was laid off and the company refused to reinstate him in his bargaining unit job. Redmond brought suit for, *inter alia*, breach of contract and fraud. The District Court held that Redmond's claims were pre-empted and the Eleventh Circuit affirmed, finding that the plaintiff's claims derived from his layoff and "the company's subsequent refusal to reinstate him to a bargaining unit job *in accordance with the UMW collective-bargaining agreement*". *Redmond*, 734 F.2d at 635 (emphasis added). The Court concluded that: "This case clearly presents a suit for violation of a contract between an employer and a labor union representing employees and therefore falls within § 301 LMRA." *Id.* In short, the Third Circuit in the instant case correctly distinguished *Redmond* on the ground that it involved a suit based on a collective bargaining

tiffs in those cases asserted a claim, as Malia is here, which arose from an agreement for employment in a non-union managerial position. Not surprisingly, therefore, the Courts of Appeals in those cases held that the plaintiffs' state claims were pre-empted. Those decisions, however, are not in conflict with the Third Circuit's decision in the instant case inasmuch as they involved materially different facts.

Apart from distinguishing *Eitmann v. New Orleans Public Service Inc.*, 730 F.2d 359 (5th Cir. 1984), on its facts, the Fifth Circuit's analysis in that case warrants further comment. In *Eitmann*, the plaintiff was a union member who sued his employer under state law for breach of an oral employment contract entered into at the time he was hired concerning discharge in the event of disability. The Fifth Circuit held that the plaintiff's claim was pre-empted even though he was seeking to enforce an individual contract separate from the collective bargaining agreement. The basis for this holding was the Court's finding that a dispute with regard to company practices, policies or customs that are not explicitly covered by a collective bargaining agreement may nonetheless be subject to the contractual grievance procedure. *Eitmann*, 730 F.2d at 363. RCA asserts that *Eitmann* cannot be reconciled with the Third Circuit's decision here because the Third Circuit "would permit unionized employees to negotiate employment contracts with respect to working conditions left open by a 'careful reading' of the applicable collective-

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agreement. *Malia*, 794 F.2d at 913 n.4 (A8). Thus, contrary to RCA's assertion (Pet. at 14), the *Redmond* decision does not reflect a position of the Eleventh Circuit which is incompatible with that of the Third Circuit. Simply stated, the collective bargaining agreement here, unlike those in *Redmond,* contained no provision granting any right to reinstatement.

bargaining agreement", while the Fifth Circuit would not. (Pet. at 15).

Significantly, the Fifth Circuit in *Eitmann* found support for its analysis in this Court's recent decision in *Belknap, Inc. v. Hale,* 463 U.S. 491 (1983), discussed *supra* at 7. Specifically, the Fifth Circuit stated:

> *Belknap* provides some guidance but is not dispositive of the case before us. The Court was not there presented with a situation in which *employees who were covered by a collective bargaining agreement* sought to bring an action on an alleged separate contract.

Eitmann, 730 F.2d at 364 (emphasis added).

Thus, the Fifth Circuit itself recognized the critical fact applicable to Malia and to the plaintiffs in *Belknap* which distinguishes them from the plaintiff in *Eitmann:* Malia and the plaintiffs in *Belknap* were not "employees covered by a collective-bargaining agreement" who were seeking to bring an action on an alleged separate contract. Here, Malia's claim arose while he occupied a managerial position and in *Belknap* the plaintiff replacement workers were never subject to any collective bargaining agreement. Also, it should be noted that it appears from the opinion in *Eitmann* that the Fifth Circuit conducted a "careful reading" of the collective bargaining agreement there involved, as did the Third Circuit here. In both instances, such a reading was required to determine whether the subject matter of the plaintiffs' respective claims were within the scope of the applicable collective bargaining agreement.

As for the Eighth Circuit's decision in *Anderson v. Ford Motor Co.,* 803 F.2d 953 (8th Cir. 1986), it does not reflect

a "position" in conflict with four other circuits as RCA urges. In *Anderson,* the Court expressly applied the standards enunciated by this Court in *Lueck* and concluded that the plaintiff's state claims were not derived or implied from a collective bargaining agreement. *Anderson,* 80 F.2d at 856, 857.

Moreover, RCA mischaracterizes *Anderson* as representing the "position" of the Eighth Circuit. The *Anderson* opinion itself referred to earlier decisions of the Eighth Circuit in which state claims had been held pre-empted under *Lueck* (*i.e., Bell v. Gas Service Co.,* 778 F.2d 512 (8th Cir. 1985); *Hillard v. Dobelman,* 774 F.2d 886 (8th Cir. 1985)), and under this Court's decisions prior to *Lueck (i.e., Moore v. General Motors Corp.,* 739 F.2d 311 (8th Cir. 1984), *cert. denied,* 471 U.S. 1099, (1985). *Anderson,* 803 F.2d at 957.[6] In short the majority in *Anderson* observed that "in *Lueck*. . .the Supreme Court directed that the determination of whether preemption is required must be made on a case-by-case basis" (*Id.*) and proceeded to find the plaintiffs' state claim not pre-empted. Furthermore, even the dissenting opinion in *Anderson,* upon which RCA relies, *supports* Malia's position here. For Judge Bright noted that the plaintiffs' claims in *Anderson* were not analogous to those asserted

[6]That *Anderson* does not reflect any "position" of the Eighth Circuit on preemption but is only one of many decisions applying *Lueck* is further demonstrated by the Eighth Circuit's decision in *Johnson v. Hussman Corp.,* 805 F.2d 795 (8th Cir. 1986). In that case, the Court held that a unionized employee's state-rooted claim of retaliatory discharge was pre-empted. Circuit Judges McMillan and Bowman were on the panels in both *Anderson* (decided on October 23, 1986) and *Johnson* (decided on November 17, 1986). Thus, the Eighth Circuit's decision in *Anderson* does not represent any "position" of the Eighth Circuit at odds with any decision in any other circuit on the same facts.

in *Belknap,* discussed *supra* at 7, in which this Court found no preemption. Judge Bright cited the fact that the replacement workers in *Belknap* were not covered by the collective bargaining agreement and had no remedy under it. The same is true of Malia here.

In sum, there is no conflict among the Circuit Courts of Appeals on the issue raised by the facts of this case. RCA has confused the appellate courts' reaching varying results in labor preemption cases, which indeed *Lueck* contemplated, with the courts' applying different legal standards. The conflict asserted by RCA, at bottom, is artificial and reflects RCA's refusal to recognize the significance of the fact that Malia's claims are not predicated even indirectly on any collective bargaining agreement and that they did not arise while he was subject to any collective bargaining agreement.

III. The Result of This Court's Review of the Decision in *William v. Caterpillar Tractor Co.*, 786 F.2d 928 (9th Cir. 1986), *Cert. Granted*, 55 U.S.L.W. 3357 (U.S. November 17, 1986) (No. 86-526) Will Have No Effect on This Case

RCA contends that this Court granted certiorari in *Williams v. Caterpillar Tractor Co., 786 F.2d 928 (9th Cir. 1986), cert. granted,* 55 U.S.L.W. 3357 (U.S. November 17, 1986) (No. 86-526) in order to decide "whether an employee who is covered by a collective-bargaining agreement can enforce under state law a private employment agreement allegedly negotiated with his or her employer" (Pet. at 7-8). This contention, Malia submits, is without merit for two reasons. First, the question presented in *Williams* was whether so-called "complete preemption" under § 301 of the Labor-Management Relations Act ap-

plied to the circumstances of that case (which circumstances are not present in the instant case) so as to permit the removal of the employee's state claims to federal court. In short, the central issue in *Williams* is the propriety of removal under Section 301 on the basis of the facts in that case. Here, removal under Section 301 is not an issue since, as RCA concedes, it has an alternative basis for removal, *i.e.,* diversity of citizenship (Pet. at 9).[7]

Secondly, the instant case does *not* raise any issue pertaining to "an employee who is covered by a collective-bargaining agreement." Unlike the breaches of the promises made to the employees in *Williams,* the breaches of Malia's agreement applicable to his managerial position occurred when he was not protected by or subject to any collective bargaining agreement and when he was not even a member of the union. Furthermore, in *Williams* the collective bargaining agreement did contain provisions governing the subject matter of the employees' state claims — plant closure, transfer and termination. As found by the Court of Appeals in the instant case, no provision in the collective bargaining agreement established any right to return to a position in the bargaining unit.

Most importantly, the crux of the employer's argument in *Williams* is that the employee's private agreement for permanent employment (assuming satisfactory performance) was "merged" into a collective bargaining agreement which covered the employees *after* they had returned to the bargaining unit. RCA asserts that "the instant case

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[7]It is significant to note that the decision of the Court of Appeals for the Ninth Circuit which RCA claims states the "position" of that Circuit on preemption (*Bale v. General Telephone Co.,*) refers to *Williams* solely in the context of removal. *Bale,* 778 F.2d at 778. *Bale* was decided only three months after *Williams.*

also raises this issue, since RCA's preemption argument rests on the premise that *any* oral agreement between Malia and RCA would be subsumed by the Local 178 labor agreement." (Pet. at 9; emphasis added). However, in contrast to the employees in *Williams,* Malia's agreement for a managerial position has not been merged into any collective bargaining agreement to which he *subsequently* became a party. Indeed, by this litigation Malia is seeking to *become* a party to the existing Local 178 agreement.

RCA, in fact, is seeking to expand the scope of preemption far beyond the boundaries set in *Lueck.* RCA argues that:

> [T]he reasons supporting preemption are even stronger in this case than in *Williams,* since Malia still belonged to the bargaining unit at the time he supposedly reached his private agreement with supervisor May, and, thus, was still represented by Local 178 in all matters concerning the terms and conditions of his employment.

Pet. at 9.

This argument, if valid, would mean that Local 178, as Malia's representative, should have negotiated the terms and conditions of Malia's employment in a managerial position outside the bargaining unit – a most unusual role for a union, to be sure. In short, RCA's argument rests on a premise for which there is no precedent and which, in effect, would force a union employee to quit his job, resign from the union, and *then* take his chances on obtaining a position outside the bargaining unit. Thus, contrary to RCA's assertion, a reversal by this Court of the Ninth Circuit in *Williams* would not undermine the Third Circuit's holding that Malia had the power to negotiate a private

agreement with RCA enforceable under state law. Malia, like any employee, had the inherent right to negotiate a private agreement for a position *outside the bargaining unit.*

Finally, RCA urges this Court to withhold a ruling on its petition "until *Williams* has clarified the governing law." The "governing law" on labor preemption (apart from the removal issue presented in *Williams*) needs no clarification; the standards set by this Court in its unanimous decision in *Lueck* are clear and workable. The problem which RCA has is not with any lack of clarity in the governing law but rather is with the result of the law's application to the facts of the instant case. Accordingly, RCA's Petition presents no important issue for review by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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